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UNITED STATES DISTRICT COURT

10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 SAN FRANCISCO DIVISION

12

13 DANIEL LEVIN; MARIA LEVIN; PARK LANE) No. 3:14-CV-03352-CRB
ASSOCIATES, L.P.; THE SAN FRANCISCO)
14 APARTMENT ASSOCIATION; and THE) **PLAINTIFFS' REPLY**
COALITION FOR BETTER HOUSING,) **MEMORANDUM IN SUPPORT**
15) **OF MOTION FOR**
Plaintiffs,) **TEMPORARY RESTRAINING**
16) **ORDER AND PRELIMINARY**
v.) **INJUNCTION**
17)
CITY AND COUNTY OF SAN FRANCISCO,) Judge: Hon. Charles R. Breyer
18) Courtroom 6, 17th Floor
19) Date: August 22, 2014
Defendant.) Time: 10:00 a.m.
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INTRODUCTION

Defendant City and County of San Francisco (City) seeks to recast an Ordinance that requires Daniel and Maria Levin (Levins) and Park Lane Associates, L.P. (Park Lane) (together, Plaintiffs) to pay hundreds of thousands of dollars to tenants before they can retire from the landlord business as an unremarkable rent control law. But it is hardly that. The Ordinance retroactively charges rental property owners like the Levins outrageous sums of money before they can exercise their state (Ellis Act) and federal right to exclusively enjoy their property. It transfers the money to tenants who live in an expensive area subject to the Ellis Act since the 1980's, for their personal use.

There is no doubt that the Ordinance immediately applies to Plaintiffs, and the City concedes that it forces Plaintiffs to choose between making \$100,000+ tenant payments or submitting to the continued occupancy of their property—and loss of the right to exclude others from the property. The City’s main objections to Plaintiffs’ request for preliminary relief are thus procedural in nature. But the objections have no merit. Plaintiffs’ request for equitable relief from a violation of their constitutional rights is proper, and their claims are ripe—either because they are exempt from the state court requirement of *Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 192-94 (1985), or because prudential efficiency and fairness concerns warrant federal review now. Finally, tenants need not be joined to this suit because they are not necessary parties.

On the merits of the suit, the City ignores or distorts the precedent supporting Plaintiffs, particularly precedent that applies a *per se* takings test for demands for money related to ownership of property. The precedent establishes that Plaintiffs are likely to prevail on all or some of their claims, and that they will suffer irreparable constitutional harm, either through an unconstitutional confiscation of their money or their real property, if the Court does not issue a preliminary injunction.

REPLY TO THE CITY'S STATEMENT OF "FACTS"

To minimize the burden imposed by the Ordinance's tenant payment demand, the City levels certain factual allegations about profits that Plaintiffs and property owners in general might

1 realize when invoking the Ellis Act. But these allegations are improper, irrelevant, and just plain
 2 wrong.

3 **A. The City's Objection to "Ellis Act Profits" Is
 4 an Irrelevant Complaint About the Legislature**

5 The City clearly has a problem with the fact that private property can increase in value
 6 when it is taken off the rental market under the Ellis Act. Opp. at 2-3. Of course, as the City
 7 admits, the "highly regulated nature of the landlord business in San Francisco" creates the higher
 8 values for property released from the rental market (as opposed to those in that market). Opp. at
 9 2. It is odd for the City to criticize disparities in rental/non-rental property values when its own
 10 regulations helped create the disparity.

11 Ultimately, the City's complaint against "Ellis Act profits" is simply an objection to the
 12 Ellis Act. After all, the legislature knew when it passed the Ellis Act that property taken off the
 13 rental market and put to non-rental uses might increase in value.¹ And yet, the legislature still
 14 considered an owner's right to go out of the landlord business to be supreme to local government's
 15 desire to keep property in the rental business for the benefit of tenants. And therein lies the City's
 16 real bone of contention: it does not like the Ellis Act. But the remedy for that complaint lies with
 17 the legislature, not with individual property owners like the Levins and Park Lane who are simply
 18 exercising rights which the state legislature recognized and protected when enacting the Act.

19 **B. The City Fails to Accurately Portray the Levins' Situation**

20 The City recognizes that the Levins must pay more than \$117,000 to a single tenant to take
 21 exclusive use of their one-bedroom lower unit. It then implies they should have sought an
 22 administrative "undue financial hardship" reduction—while at same time alleging that the Levins'
 23 property has increased in value by about two and half million dollars. Opp. at 5.

24

25 ¹ The Ellis Act was a direct response to the California Supreme Court's decision in *Nash v. City*
 26 *of Santa Monica*, 37 Cal. 3d 97 (1984). In *Nash*, a property owner sought to evict tenants and tear
 27 down an apartment building to "allow the land to appreciate in value." *Id.* at 101. The court
 28 upheld the City of Santa Monica's refusal to permit the removal of the apartment building, but the
 state legislature subsequently passed the Ellis Act to overrule *Nash* and to allow property owners
 aspiring to put their property to usually more valuable non-rental uses to go out of the rental
 business.

1 The truth is that the Levins are financially able to make the payment to their tenant when
 2 taking into account all the “resources available” to them, including their real property values, as
 3 the Ordinance requires. S.F. Admin. Code § 37.9A(e)(3)(G)(i). That is why they do not qualify
 4 for undue financial hardship relief. However, as a matter of practical reality, the Levins must find
 5 *cash* for the payment from somewhere. They will likely have to move money from funds slated
 6 for retirement to cover the payment.

7 **C. Park Lane’s Constitutional Rights Do Not Depend on Its Financial Status**

8 The City’s treatment of Park Lane is rife with references to unverified news reports alleging
 9 that Park Lane stands to make a large profit by removing its property from the rental market. The
 10 point of this is unclear. However, the City appears to be suggesting that Park Lane enjoys less
 11 constitutional protection against a taking of its property due to its potential to make a profit in the
 12 end. This is untrue, of course. Constitutional rights do not wax or wane based on the wealth of
 13 the plaintiff. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 427 (2003) (“The wealth
 14 of a defendant cannot justify an otherwise unconstitutional punitive damages award.”); *BMW of*
 15 *N. Am. v. Gore*, 517 U.S. 559, 585 (1996) (“The fact that BMW is a large corporation rather than
 16 an impecunious individual does not diminish its entitlement to [constitutionally mandated] fair
 17 notice of the demands that the several States impose on the conduct of its business.”).

18 Park Lane’s financial status has no bearing on the constitutionality of the tenant payment
 19 demands levied on it by the Ordinance. *See id.*; *see also Philip Morris USA v. Williams*, 549 U.S.
 20 346 (2007) (punitive damages award held to be an unconstitutional taking of corporation’s
 21 property). The only reason that Park Lane’s assets matter here is that they preclude Park Lane
 22 from seeking an administrative “undue financial hardship” reduction from the Ordinance’s
 23 requirements. The City apparently recognizes this, as it declines to argue that Park Lane qualifies
 24 for such relief.

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1 | **ARGUMENT**2 | **I**3 | **PLAINTIFFS HAVE PROPERLY SOUGHT
INJUNCTIVE RELIEF, THEIR TAKINGS CLAIMS ARE
RIPE WITHOUT RESPECT TO STATE COURT DAMAGES
PROCEEDINGS, AND TENANTS NEED NOT BE JOINED**4 | **A. Injunctive Relief Is Proper To Address a Money Demand Taking**

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 6 |
 7 | The City does not dispute that Plaintiffs may seek a declaration and an injunction to remedy
 8 | the violation of rights under the Fourth Amendment, Due Process Clause, and Ellis Act. It also
 9 | does not object to Plaintiffs' request for injunctive relief as a remedy for their Public Use takings
 10 | claim, with good reason. *See Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 235 (1984). But it does
 11 | argue that Plaintiffs cannot request an injunction in connection with their takings claims. Opp. at
 12 | 1, 18-19. The City's objection misses the mark because it hinges on inapposite "denial of
 13 | development" regulatory takings cases while ignoring on-point money takings cases that permit
 14 | injunctive relief.

15 |
 16 | For instance, in *Eastern Enters. v. Apfel*, 524 U.S. 498, 520 (1998), and *Brown v. Legal*
 17 | *Found. of Wash.*, 538 U.S. 216, 228-29 (2003), plaintiffs challenged as a taking a governmental
 18 | requirement that they transfer a discreet fund of money to a class of individuals. Plaintiffs in both
 19 | cases asked for injunctive relief, *id.*, and in both cases, the Court allowed the request. *Eastern*
 20 | *Enters.*, 524 U.S. at 521; *Brown*, 538 U.S. at 228-29. The Ninth Circuit has been equally willing
 21 | to entertain takings claims for injunctive relief when the claim deals with a taking of money. *See*
 22 | *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 846 (9th Cir. 2001) (en banc); *Taylor*
 23 | *v. Westly*, 402 F.3d 924, 935-36 (9th Cir. 2005); *Ward v. Ryan*, 623 F.3d 807, 810 (9th Cir. 2010).
 24 | Other federal courts have followed the same course. *Asociacion De Subscripcion Conjunta Del*
 25 | *Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 12, 19-20 (1st Cir. 2007);
 26 | *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262 (5th Cir. 2012).

27 |
 28 | It is these cases, rather than cases that deal with retrospective land use takings claims, that
 control here. As *Eastern Enters.* explains, when a law takes a discreet fund of money, but the
 transfer of money away from its owner has not yet occurred, a suit for compensation is "not

1 available,” and therefore, a request for an injunction is proper. *Eastern Enters.*, 524 U.S. at 520.

2 **B. Plaintiffs’ Takings Claims Are Categorically Exempt from *Williamson*
3 *County*; Alternatively, Prudential Concerns Warrant Review**

4 The City raises a ripeness challenge to some of Plaintiffs’ takings claims under *Williamson*
5 *Cnty.*, claiming Plaintiffs had to seek monetary compensation in state court before resorting to
6 federal court.² The City does not, however, claim that Plaintiffs’ Public Use takings claim is
7 unripe under *Williamson Cnty.*, Opp. at 8. Nor does it claim that Plaintiffs’ Fourth Amendment
8 and Due Process Claim are subject to *Williamson Cnty.*’s “just compensation” takings ripeness
9 rule. The City further agrees that *Williamson Cnty.* is now a discretionary, prudential ripeness
10 doctrine. Opp. at 7.

11 The City argues only that the Court should decline to adjudicate Plaintiffs’ physical takings
12 claim, regulatory takings claim, and unconstitutional conditions claim until Plaintiffs seek
13 compensation in state court pursuant to *Williamson Cnty.* *Id.* It is mistaken. As Plaintiffs’
14 opening memorandum demonstrates, takings claimants seeking equitable relief from a taking of
15 a money tied to real property may sue in federal court without first seeking damages in another
16 court. Pls.’ Mem. of P. & A. at 12. More generally, claimants that raise taking claims that seek
17 relief other than money damages need not resort to state court for such damages before litigating
18 their claims in state court. *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). The City disagrees,
19 but provides no rebuttal to Plaintiffs’ authority.

20 Plaintiffs’ takings claims are wholly exempt from *Williamson Cnty.* But even if this were
21 not true, it would still be appropriate for the Court to use its prudential discretion to immediately
22 hear those claims, along with the non-takings claims. After all, a primary prudential concern is the
23 avoidance of inefficient, piecemeal litigation. *San Remo Hotel, L.P. v. City & Cnty. of San*
24 *Francisco*, 545 U.S. 323, 346 (2005); *MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340,

25 _____
26 ² The City does not claim that Plaintiffs’ claims are unripe under *Williamson Cnty.*’s first “final
27 decision” ripeness prong. The City does mention exhaustion of administrative remedies, without
28 directly claiming Plaintiffs were required to exhaust such remedies. In any event, it is settled that
a 42 U.S.C. § 1983 claimant need *not* exhaust administrative remedies. *Patsy v. Bd. of Regents of*
Fla., 457 U.S. 496, 516 (1982).

1 350 n.7 (1986). The City concedes that at least three of Plaintiffs' constitutional property rights
 2 claims will be litigated in this forum. As a matter of judicial economy and fairness, the Court
 3 should consider all the claims together. *Town of Nags Head v. Toloczko*, 728 F.3d 391, 399 (4th
 4 Cir. 2013) ("This is a proper case to exercise our discretion to suspend the state-litigation
 5 requirement of *Williamson Cnty.* In the interests of fairness and judicial economy, we will not
 6 impose further rounds of litigation on the [plaintiffs].").

7 **C. The Tenants Are Not Necessary Parties to This Suit**

8 The City argues that Plaintiffs' tenants should be joined to this lawsuit, but it cannot bear
 9 its burden to show they are necessary parties. An absent party is necessary for purposes of Fed.
 10 R. Civ. P. 19, if that party has a legally protected interest in the suit. *Makah Indian Tribe v. Verity*,
 11 910 F.2d 555, 558 (9th Cir. 1990). The interest must be more than a financial stake. *Id.* (citing
 12 *N. Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 468 (9th Cir. 1986)). It also must entail more than
 13 speculation about a future event. *Id.* (citing *McLaughlin v. Int'l Ass'n of Machinists*, 847 F.2d 620,
 14 621 (9th Cir. 1988)). If a legally protected interest exists, the party seeking joinder must show that
 15 the interest will be impaired as a practical matter if the suit proceeds. Impairment is unlikely if the
 16 absent party is adequately represented in the suit. *Makah*, 910 F.2d at 558 (citing *Wichita &*
 17 *Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 774 (D.C. Cir. 1986)).

18 Here, tenants do not have a legally protected interest in the purely financial windfall the
 19 Ordinance attempts to give them at the expense of property owners, and the City has cited no
 20 authority to the contrary. Moreover, until the constitutionality of the Ordinance is determined, the
 21 tenants' financial interest is speculative. Finally, even if the tenants had a non-financial, legal
 22 interest in the suit, their interest is more than adequately represented by the City Attorneys. *Sw.*
 23 *Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1153-55 (9th Cir. 1998). The tenants'
 24 ability to protect their interest is accordingly not impeded as a practical matter by prosecution of
 25 this suit. *Id.* The tenants are not a necessary party to this suit and need not be joined. *Id.*; *see also*
 26 *Disabled Rights Action Comm. v. Las Vegas Events*, 375 F.3d 861 (9th Cir. 2004).

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II

THE CITY MISREPRESENTS OR IGNORES TAKINGS AND UNCONSTITUTIONAL CONDITIONS LAW THAT SUPPORTS PLAINTIFFS' CLAIMS

The City contends Plaintiffs have little chance of success on the merits of their claims. It is wrong.

A. The City's Reliance on Generalized Rent Control Law Is Bizarre and Unsupported

At the outset of the City’s discussion of the merits of Plaintiffs’ takings claims, it makes a strange argument. It contends that the Ordinance’s demand that rental property owners pay hundreds of thousands of dollars to their tenants before they can take exclusive possession of their property cannot cause a taking because the demand is less onerous than rent control in general, which the City claims is constitutional. Opp. at 8. Putting other objections aside for the moment, the argument is baseless because it is not predicated on any known authority. The City does not identify a standard, case, or even a law review article undergirding its novel theory that a law demanding a huge cash payment to tenants before a property owner can go out of the rental business is *per se* constitutional simply because some courts have upheld general rent (price) regulation.

Nevertheless, the predicates behind the City’s logic are false, and a brief examination of those predicates illustrate the constitutional injuries presented by the Ordinance. The City says that Plaintiffs have two choices under the Ordinance: (1) “[t]heir first choice is to keep the status quo, and refrain from using the Ellis Act to evict all their tenants, but continue to charge their tenants less than fair market rent for their units,” or (2) they can “exercise their Ellis Act rights, pay two years’ worth of Monthly Rent Differentials, and recover possession of their units.” Opp. at 8. In other words, the City agrees with Plaintiffs that the Ordinance requires them to submit to the unwanted physical occupancy of their property, Opp. at 15 (“requiring Plaintiffs to continue to rent their units is lawful”), or make large cash payments to tenants who can then use their landlord’s money for any private purpose.

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1 The City makes its creative assertion that the second—tenant payment—option is
 2 constitutional after concluding that the first “status quo” option is constitutional and less onerous.
 3 Opp. at 8-9, 15. But the premise is false. Rent control laws may be constitutional *if* they do not
 4 compel property owners to remain in the rental business. *Yee*, 503 U.S. at 528, 539. But they are
 5 unconstitutional if they compel an owner to rent and, thus, to forfeit possession and control of their
 6 property. *Id.* And that is exactly what the “status quo” option does: it is a compelled and
 7 unconstitutional, physical occupation option. Whether it is “less onerous” than the tenant payment
 8 option is debatable, but ultimately, irrelevant. What matters is that the “status quo” occupation
 9 scenario is unconstitutional. Accordingly, it cannot be used to justify the tenant payment option.
 10 Indeed, as shown more fully below, that option is also unconstitutional.

11 **B. Under Pre-*Koontz* Precedent, the City’s Demand for Plaintiffs’
 12 Money Categorically Takes Plaintiffs’ Property**

13 **1. Pre-*Koontz* Law Treats a Money Demand as a Per Se Taking**

14 The City wrongly contends that a per se takings analysis is inapplicable to the Ordinance’s
 15 tenant payment requirement. In so doing, the City rejects Plaintiffs’ contrary argument—that a per
 16 se takings test *does* apply—as a position based solely on *Koontz v. St. Johns River Water Mgmt.*
 17 *Dist.*, 133 S. Ct. 2586 (2013). But this is not true. Plaintiffs rely largely on pre-*Koontz* decisions,
 18 such as *Brown*, 538 U.S. at 235, and *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155,
 19 164 (1980), which treat laws confiscating discreet monetary sums as per se takings. In *Brown*, the
 20 Court adopted a “per se” takings analysis for a takings claim based on the transfer of monetary
 21 interest from one party to another, concluding that “the transfer of the interest . . . seems more akin
 22 to the occupation [and physical taking] of a small amount of rooftop space in *Loretto*.” *Brown*, 538
 23 U.S. at 235.³ Strangely, the City completely fails to address this precedent.

24

25 ³ Interestingly, the City quotes the Ninth Circuit’s *Wash. Legal Found.* decision for the
 26 proposition that “‘the per se analysis . . . is a particularly inapt analysis when the property in
 27 question is money,’” Opp. at 12 (quoting *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d
 28 at 854 (en banc)). Yet, it fails to note that the Supreme Court *rejected* the Ninth Circuit’s view on
 the proper standard upon granting certiorari in *Brown*. *Brown* adopted the opposing view—that
 (continued...)

1 *Koontz* is relevant because it confirms the pre-existing *per se* standard for money takings
 2 tied to real property. For instance, *Koontz* favorably quoted *Brown* for the “proposition that when
 3 the government commands the relinquishment of funds linked to a specific, identifiable property
 4 interest such as a bank account or parcel of real property, a ‘*per se* [takings] approach’ is the
 5 proper mode of analysis.” *Koontz*, 133 S. Ct at 2600 (quoting *Brown*, 538 U.S. at 235). Further,
 6 the *Koontz* Court described *Webb’s* and *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998), the
 7 precursor to *Brown*, as “two earlier cases in which we treated confiscations of money as takings.”
 8 *Koontz*, 133 S. Ct. at 2601. Thus, in arguing that *Koontz* did not re-write general takings law, the
 9 City wrong assumes that the pre-*Koontz* framework did not treat money takings as a *per se* taking.
 10 It did.

11 If there was any remaining doubt as to whether a *per se* takings approach governs the
 12 Ordinance’s tenant payment demand, it is dispelled by cases holding that liens on private property
 13 are *per se* takings. *See, e.g., Armstrong v. United States*, 364 U.S. 40, 44-49 (1960). The tenant
 14 payment demand is akin to a lien, a right to money secured by property, and is a *per se* taking like
 15 a lien taking. *Id.*

16 The Ninth Circuit’s recent decision in *Horne v. U.S. Dep’t of Agric.*, 750 F.3d 1128 (9th
 17 Cir. 2014), on remand from the Supreme Court, does not change the foregoing conclusion. The
 18 appellate court’s *Horne* opinion did not and could not override the Supreme Court’s own *per se*
 19 money takings analysis in *Brown*, *Phillips*, and *Webb’s*. *See McIntyre v. Bayer*, 339 F.3d 1097,
 20 1101 (9th Cir. 2003) (following *Brown* in concluding that a taking of a discreet amount of money
 21 is subject to *per se* takings analysis). In any event, the *Horne* plaintiffs are currently petitioning
 22 the Supreme Court to review the Ninth Circuit’s decision in *Horne* for the second time,⁴ so *Horne*
 23 is not final.

24

25 ³ (...continued)
 26 “*a per se* approach” is the proper way of gauging a taking of a discreet amount of money. *Brown*,
 27 538 U.S. at 235.

28 ⁴ The Court previously reversed the Ninth Circuit’s first decision in *Horne* on a 9-0 vote. *Horne*
 v. *Dep’t of Agric.*, 133 S. Ct. 2053 (2013).

1 The bottom line is that the City believes the government can just order people to transfer
 2 their money to others in connection with their ownership of property, or be forced to serve as
 3 landlords without takings liability. But all the authority refutes this. Plaintiffs are likely to prevail
 4 on their takings claims.

5 **2. The Money Demanded from Plaintiffs Is Protected Property**

6 As a last gasp defense against Plaintiffs' takings claims, the City makes a vague argument
 7 that the money demanded by the Ordinance is not the correct property interest for takings analysis.
 8 The City seems to think that the demanded money must be aggregated with Plaintiffs' real property
 9 before a court can apply takings law. Opp. at 12. This is also error. The idea of aggregating
 10 property interests prior to applying takings standards is potentially relevant only when a landowner
 11 challenges a *restriction on the developmental use of real property*, asserting it has caused a
 12 regulatory taking by reducing the value of the regulated land. *Lucas v. S.C. Coastal Council*, 505
 13 U.S. 1003, 1016 n.7 (1992); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497-
 14 501 (1987).

15 When property is subject to a physical taking, as here, the property taken (no matter how
 16 small) is subject to (per se) takings analysis, without respect to other property interests. *Lucas*, 505
 17 U.S. at 1015; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434, 436 (1982).
 18 Further, the aggregation principle has never been applied in the money takings context; instead,
 19 takings law applies directly to the specific money being taken. *Brown*, 538 U.S. at 235, *Koontz*,
 20 133 S. Ct. at 2600-01; *Eastern Enters.*, 524 U.S. at 540 (Kennedy, J., concurring).

21 **C. The City Fails to Correctly Apply the *Dolan* Test**

22 Plaintiffs have argued that they will prevail on their unconstitutional conditions claim if
 23 the Court concludes that Plaintiffs are unlikely to prevail on their traditional takings claims. The
 24 City disagrees, but its position rests on a faulty application of the *Dolan* "roughly proportionate"
 25 test.⁵

26 ///

27 ⁵ Plaintiffs disagree with the City's *Nollan* analysis as well, because it fails to account for tenants'
 28 unrestricted ability to use the payment for non-rental purposes.

1 The City argues the tenant payment requirement is proportionate because “it compensates
 2 the tenant for the difference between the tenant’s current regulated rent and market rent.” Opp.
 3 at 15-16. But this does not go to proportionality, because it does not gauge whether the nature and
 4 degree of the payment is sufficiently tailored to Plaintiffs’ withdrawal of their properties. More
 5 particularly, the assertion does not account for the fact that the law requires property owners to
 6 give their tenants *two years* worth of subsidized open market rents. The City offers no reason why
 7 this is proportional to the Levins’ decision to take a unit off the market. Nor does the City’s
 8 analysis account for the fact the tenants can use their two years of subsidized rent for any purpose.
 9 It is these factors that make the Ordinance’s tenant payment scheme disproportionate in nature and
 10 degree to the impact of Plaintiffs’ decision to exercise their legal right, after proper notice, to leave
 11 the rental market. Plaintiffs are therefore likely to prevail on their unconstitutional conditions
 12 claim. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); *see also Loretto*, 458 U.S. at 439 n.17
 13 (“[A] landlord’s ability to rent his property may not be conditioned on his forfeiting the right to
 14 compensation for a physical occupation.”).

15 **D. The Ordinance Does Not Rationally Advance a Public Purpose When
 16 It Gives Money to Tenants for Their Unrestricted Private Use**

17 On the Public Use takings claim, the City argues that the standard is so deferential as to be
 18 almost blind to the realities of the private-to-private transfer occurring here. But Public Use
 19 review, even under a rational basis test, “does not . . . alter the fact that transfers intended to confer
 20 benefits on particular, favored private entities, and with only incidental or pretextual public
 21 benefits, are forbidden by the Public Use Clause.” *Kelo v. City of New London, Conn.*, 545 U.S.
 22 469, 490 (2005) (Kennedy, J., concurring). “A court applying rational-basis review under the
 23 Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a
 24 particular private party, with only incidental or pretextual public benefits” *Id.* at 491
 25 (Kennedy, J., concurring). The problem for the City here is that the Ordinance’s tenant payment
 26 scheme cannot rationally advance the City’s alleged purpose—mitigating relocation or rent costs
 27 for tenants—when it simply hands over the landlord’s money to tenants with no strings attached.
 28 This flaw dooms the Ordinance even under deferential rational basis Public Use review. And it

1 certainly defeats the Ordinance under the *Kelo* Justices' (four dissenting, one concurring)
 2 repudiation of a taking "that . . . is intended to favor a particular private party, with only incidental
 3 or pretextual public benefits." *Id.*; *see also id.* at 497 (O'Connor, J., dissenting) ("Government
 4 may compel an individual to forfeit her property for the *public's* use, but not for the benefit of
 5 another private person."). After all, the Ordinance intentionally benefits private tenants, with only
 6 incidental public benefits (if that), by transferring a landlord's money to the tenants without any
 7 restrictions on their use of the money. The tenant payments thus "directly benefit tenants, not
 8 society at large." *Pieri v. City & Cnty. of San Francisco*, 137 Cal. App. 4th 886, 893 n.5 (2006).

9 **CONCLUSION**

10 The Court should conclude that Plaintiffs have demonstrated a likelihood of prevailing on
 11 their claims and that they face a high risk of irreparable harm if the Court does not issue an
 12 injunction. It should then grant Plaintiffs' motion for a temporary restraining order and
 13 preliminary injunction.

14 DATED: August 19, 2014.

15 Respectfully submitted,

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18 By /s/ J. David Breemer
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